IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

TUESDAY, THE 30TH OCTOBER 2007 / 8TH KARTHIKA 1929

Crl.MC.No. 3215 of 2007()

CC.172/2005 of CHIEF JUDL.MAGISTRATE, ERNAKULAM

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PETITIONER: ACCUSED

Y.P.BAIJU, AGED 37 YEARS, S/O.PAVITHRAN,
MANAGING DIRECTOR, M/S.SKYLINK INTERNATIONAL,
VALANJAMBALAM KOCHIN AND HAVING PERMANENT
RESIDENCE AT THODIYIL VEEDU, AMRUTHAKULAM CHERY,
MUNDACKAL, KOLLAM.

BY ADV. SRI.V.VENUGOPALAN NAIR
SRI.C.UNNIKRISHNAN (KOLLAM)

RESPONDENTS: COMPLAINANT

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1. STATE OF KERALA, REPRESENTED BY
THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

2. RAVEENDRAN, AGED 64,
S/O.AYYAPPAN, THEKKINKATTIL HOUSE,
PALLITHAZHAI, VEZHAPARAMBUKARA, MULANTHURUTHI
VILLAGE, ERNAKULAM DISTRICT.

3. M.N.THANKAPPAN, AGED 64,
S/O.NEELAKANTAN, KALAVAS HOUSE, KAKKOOR PO,
THIRUMARADI VILLAGE, KOOTHATTUKULAM,
MOOVATTUPUZHA TALUK, ERNAKULAM DISTRICT.

4. SAKARIYA MATHEW, AGED 74,
S/O.MACHU, PADIYARA HOUSE, I.E.NAGAR,
VADAKKUM MOODU, VAZHAPPALLY VILLAGE,
CHANGANASSERRY TALUK, KOTTAYAM DISTRICT.

5. THE SUB INSPECTOR OF POLICE,
CENTRAL POLICE STATION, ERNAKULAM.

R1 AND 5 BY PUBLIC PROSECUTOR SRI. M.S. BREEZ

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON 30/10/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

R. BASANT, J.

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Crl.M.C.No. 3215 of 2007

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Dated this the 30th day of October, 2007

O R D E R

Is composition of a criminal offence a unilateral act or a bilateral one? Is it necessary to insist on the appearance of an accused person to enable the victim to compound a criminal offence? Is a criminal court justified in insisting on a joint application for composition by the victim and the accused for invoking the powers under Section 320 Cr.P.C. to accept and/or accord permission for a composition? Is there any distinction between "withdrawal" of a complaint under Section 257 Cr.P.C. and composition of an offence under Section 320 Cr.P.C.? Even if there is such a distinction, is that distinction relevant in the dynamics of operation under Section 320 Cr.P.C.? Does such alleged distinction justify insistence by the Court on the personal appearance of the accused to consider an application for composition? In a case where the Court has chosen to issue non-bailable warrant against the accused, is it essential that such accused must appear personally before the court for any further steps - even for a further step for which personal presence of the accused is not essential? The above questions of daily relevance,

recurrence and significance before a criminal court arise for consideration in this Crl.M.C.

2. Bereft of details, the crucial facts in the case can be summarised thus: Three persons together filed a joint complaint before the City Police Commissioner, Ernakulam. The allegation was that the accused, the petitioner herein, had committed the offence of cheating and breach of trust punishable under Sections 406 and 420 I.P.C. Final report was filed. Cognizance was taken by the learned Magistrate. The petitioner received process. He along with the complainants/victims appeared before the learned Magistrate through counsel and filed application for composition. The learned Magistrate, it is submitted, insisted on personal appearance of the petitioner and his being released on bail as a condition precedent to permit composition. The petitioner could not arrange sureties and could not appear before the learned Magistrate. Warrant of arrest has been issued against him. The petitioner wants the powers under Section 482 Cr.P.C. to be invoked to direct the Magistrate to consider the application for composition without insisting on his personal presence, notwithstanding the issue of a non-bailable warrant against him. It is in this facts scenario that the above questions have come up for hearing.

3. What is composition of a criminal offence? A look at the very fundamentals may be helpful. There is a basic and axiomatic fiction in criminal jurisprudence - that all crimes are offences against the State. There may be personally aggrieved individuals also because of the commission of the crime. But in all crimes, the real aggrieved is and ought to be the State representing the entire polity. Whether it be unmerited acquittal or conviction, the real looser, an aggrieved, fictionally is the State. The State may condone and compound the crimes. The provisions of Sections 321, 432 and 433 Cr.P.C. deal with the powers of the Court to forebear from prosecuting an indictee or not compelling him to suffer the punishment.

4. Consequentially no private citizen, even if he be the direct victim of the crime, can settle, compromise or compound any criminal offence. Such a composition is not permitted by law ordinarily. It is against public policy to permit settlement, compromise or composition of felony. But this principle of law admits exceptions. The law declares certain offences to be compoundable. Except those offences which are declared by law to be compoundable, no other offence is compoundable. Litigants resort to the unethical, immoral or amoral course of turning hostile on oath to give effect to such non permissible compromise, settlement or compounding.

But the policy of law is not to accept such composition/settlement unless the offence is declared by law to be compoundable.

5. Settlement of disputes certainly caters to harmony. But the harmony sought to be achieved is not between individuals alone. Law has its ultimate objective of harmony among the polity. That is why settlement of offences by the individuals - victim and the miscreants - is not permitted by law unless the offences are declared by law to be compoundable.

6. The act of achieving harmony between the parties at variance can be achieved only by the processes known to law. Different methods are available. Slightly different processes may be there in achieving this objective of harmony. Disputes can be settled, compromised, compounded, consented etc, to achieve harmony. The latest variety of a new process is plea-bargaining which may also help in an appropriate case to achieve harmony. The processes are slightly different though they all do usher in harmony.

7. What is meant by the word 'compound'? Is it different and if so, how different it is from the other processes like compromise, settlement, withdrawal etc. It will be apposite straight away to refer to the dictionary.

The dictionary gives interesting development of the concept of the expression 'compound'. I extract below the meaning of the word in the New Oxford Dictionary of English. As a verb transitive, inter alia, there is a meaning , which is relevant for our purpose.

> "2. make (something bad) worse; intensify the negative aspects of; prisoners' lack of contact with the outside world compounds their problems.
>
> 3. Law forbear from prosecuting (a felony) in exchange for money or other consideration.
>
> Settle (a debt or other matter) in this way; he compounded the case with the defendant for a cash payment."

The following note appears thereafter:

> USAGE: The sense of the verb compound which means 'make (something bad) worse', as in this compounds their problems, has an interesting history. It arose through a misinterpretation of the phrase compound a felony, which strictly speaking, means 'forbear from prosecution a felony in exchange for money or other consideration.' The 'incorrect' sense has become the usual one in legal uses and, by extension, in general senses too, and is now accepted as part of standard English."

The word has a meaning "forbear from prosecuting a crime in exchange of money or other consideration". This meaning of the term, because of its association with felony, appears to have led to use of expression in an incorrect sense as indicated in (2) above. Be that as it may, what is relevant for our purpose is that compounding is forbearance from prosecuting a crime. It may be for material consideration, it may be for other considerations. Receipt of money or compensation may be one consideration. Piety and forgiveness may be the other. Acceptance of the / explanation/justification may be yet another. For the purpose for which we are concerned, we are interested not on the motivations that prompted a person to forbear from prosecution, we are concerned only with the act of forbearance. Considerations relevant, irrelevant, indifferent, sublime or perverse may prompt a victim to forbear from prosecution. The Court is concerned only with the willingness of the victim to forbear from prosecution. If he is willing and his decision to forbear is genuine and voluntary the composition has to be accepted when the offence is compoundable without permission. The interests of society becomes relevant only in a case where permission of the Court is necessary for composition. In this view of the matter, I have no hesitation to agree that

composition known to law must be held to be a unilateral act on the part of the victim to forbear from prosecution. That decision of his to forbear may be prompted by many a reason, which the court is not really concerned with ordinarily in a case of composition without permission provided there is willing and voluntary composition.

8. It will be apposite now to look at the specific statutory provision dealing with composition of offences. Section 320 Cr.P.C. deals with composition of offences. Sections 320(1) and (2) are identically worded except for the requirement of consent of the court. The vitally relevant portions read as follows:

> The offences punishable under the sections of the Indian Penal Code (45 of 1860) specified in the first two columns of the Table next following may be compounded by the persons mentioned in the third column of that table"

9. The language of the provision further indicates very clearly and convincingly that the composition contemplated under Section 320 Cr.P.C. is a unilateral act and not a bilateral act. Option is given for the person mentioned in column 3 (which a perusal of the tables will show is essentially the victim) to compound the offence. Telltale indications are thus available from the language employed by Section 320 Cr.P.C. that the

composition is and can be a unilateral act on the part of the victim. There is nothing in the language employed by Section 320 Cr.P.C. to indicate that the composition contemplated under Section 320 Cr.P.C. is a bilateral act.

10. If such a meaning is assigned to the word compound/ composition, what is the distinction between the expressions withdraw and compound. What then is the distinction between withdrawal under Section 257 Cr.P.C. and composition under Section 320 Cr.P.C.? From this, it is argued that withdrawal is a unilateral act and composition must be held to be a bilateral act, for which permission of the accused is also necessary. It is further urged that if composition does not pre-suppose consent and willingness of the accused, the victim who has compounded the offence may still have to face the consequence of malicious prosecution.

11. I am afraid, reference to section 257 Cr.P.C. to understand the meaning of the expression compound in Section 320 Cr.P.C. would be an incorrect and improper exercise. Section 257 Cr.P.C. applies only to summons cases. It applies only to cases instituted on a private complaint. Sections 257 and 320 Cr.P.C. do not hence cover the same field. Whether the offences be compoundable or not, withdrawal under Section 257 Cr.P.C. is permissible. Many summons offences are non-compoundable under

Section 320 Cr.P.C. Whether the offence be compoundable or not, if the prosecution is in respect of a summons case and the prosecution is instituted on a private complaint, the complaint can be withdrawn by the complainant under Section 257 Cr.P.C. Section 257 has no application at all in a case instituted on a police report. Similarly, many a compoundable offence under Section 320 Cr.P.C. is not a summons offence and therefore Section 257 Cr.P.C. can have no application at all. In these circumstances it must be seen that though there may be overlapping on certain aspects in the sense that a prosecution comes to an end in both cases, Section 257 cannot be advantageously pressed into service to understand and assimilate the concept of composition under Section 320 Cr.P.C.

12. I shall assume that there is distinction between the concept of withdrawal and concept of composition. Withdrawal can be without any reason. Compounding, going by the language, is forbearance from prosecution for any consideration. That distinction in language notwithstanding, it must be held that such distinction does not at all affect the operational dynamics of Section 320 Cr.P.C.

13. The conclusion in these circumstances appears to be inescapable that composition is and must be held to be a unilateral act. If that be so, a

criminal court will not be justified in insisting on a joint application for composition from the accused and the victim. Consequently, it has to be held that the physical appearance of an indictee is unnecessary and cannot be insisted to accept the composition by the victim.

14. In a case where permission of the court is required under Section 320(2) Cr.P.C., the court will have to exercise its discretion to grant or not to grant permission to the victim for composition. That takes me then to the next question whether atleast in such cases the court will be justified in insisting on the personal appearance of the accused. It may not be possible for this court now to visualise all the myriad fact circumstances which may appear in a possible given case. Suffice it to say that at the moment no such facts occur to me in which it may be necessary or essential for a court to insist on personal presence of the accused to consider whether permission must be given to the victim to compound the offence against the accused.

15. Normally a court can accept the word of the complainant that he has compounded the offence. The voluntariness of such composition can be verified by the court to satisfy itself that the composition is true, genuine and voluntary. The factors prompting the victim to resort to the unilateral

act of composition can also be verified from him. Suffice it to say that I find no reason at all ordinarily possible for a criminal court to insist on personal appearance of an accused person to consider the acceptability of the conduct of the victim who resorts to the unilateral act of composition. If there be the possibility of such a case, where the presence of the accused may be necessary, exceptional reasons must certainly be given by the court in its order to insist on such personal appearance of the accused. Ordinarily such insistence cannot be made at all to consider a composition either under Section 320(1) or 320(2) Cr.P.C.

16. The criminal courts in this country, I am afraid, have not really assimilated and digested the transformation in the nature of criminal proceedings. Moral depravity and contumaciousness of a really objectionable variety was the hallmark of the concept of a crime in yester years. These are days when the penal law is pressed into service even to bring in new norms of personal and commercial morality. Instances galore, where statutes declare, what till yesterday was a non-crime to be a crime. Even in the traditional concept of crimes a distinction will certainly have to be drawn between compoundable offences and non-compoundable offences. The law makers appear to have carefully chosen to categorise

the less serious offences, where indiscretion is primarily against individual and specifically against the victim, from the category of non-compoundable offences.

17. Most unfortunately, an impression appears to have gained ground that it is no wrong to inflict on the accused trauma resulting from procedural hazards. The laity as well as the knowledgeable (including criminal courts) appear to reconcile themselves to this attitude which, according to me, is objectionable. The refrain is - ultimately the accused may raise some technical defence, claim the benefit of doubt and go scot free so let him be put to as much of procedural sufferances, which in itself will be a punishment. This precarious attitude among the laity as also the men of law appear to be deeply entrenched and that explains the procedural travails which an indictee has to face before criminal courts. When he appears in court in response to an invitation by court in the form of a summons, he is not allowed to go out of the court unless he executes a bond with sureties! Whether necessary or not, his personal presence is insisted on every date of posting and should there be any lapse on his part, promptly non-bailable warrants are issued against him. The offence can be compounded by the victim. The victim is prepared to compound. He

comes before the court to compound it. Even then insistence is made on the personal presence of the accused - for what reasons one does not know. The mere fact that a person faces an indictment is unfortunately assumed to be sufficient justification for these travails of his.

18. Refined societies and sublime justice functionaries cannot accept the theory that there is nothing wrong in an indictee being subjected to such unnecessary travails. In a system which concedes to the indictee the presumption of innocence till the moment he is found guilty of the offence, the functionaries must ensure that the concept percolates into them and they imbibe the refinement of law. It is true that an under trial may be refused bail. Strict conditions may be imposed on him. All that can only be, not to inflict on him any trauma because he is an indictee, but only to ensure that until the trial is over he does not abuse his freedom and liberty. Societal protection is the only justification for such an exception in the attitude to the indictee. Erroneous acceptance/condonation of the undeserved ordeal/inconvenience inflicted on an indictee by a user unfriendly criminal court does certainly detract against the sublimity of our refined criminal adjudicatory process. The system has to transform into a system which will ensure that every guilty person meets the consequences

of his culpable indiscretion certainly and immediately, but the unnecessary vexation, harassment and inconvenience will have to be removed. The attitude of the system causes concern. The mind sets do not appear to change at all. Certainty and immediateness of the punishment can serve as the best deterrent to assure a crime free society. The system should not have to depend on the procedural hazards and inconvenience inflicted on an indictee to deter persons from committing crimes.

19. I have digressed, but the nature and import of the questions raised certainly justify the digression. The only point that remains to be considered is whether a non-bailable warrant having been issued, it is necessary now to insist on the personal appearance of the accused, before the court moves to the next stage. Nothing can be farther from reasonableness than this attitude of rigidly insisting on the personal presence of the accused if a non-bailable warrant happens to be issued. A non-bailable warrant is also only a process issued to procure the presence of a person. If the court is satisfied that such personal presence is not necessary, it will be puerile, unnecessary and unreasonable to insist on such appearance merely because a warrant has been issued. Whatever can be done in the absence of an accused can certainly be performed

notwithstanding the issue/pendency of a non-bailable warrant against such person. In that view of the matter, the pendency of the non-bailable warrant cannot persuade the court not to consider th prayer for composition and insist on the personal appearance of the accused.

20. It was submitted at the Bar that no binding precedent is available on the aspect whether personal presence of the accused is necessary to consider a prayer for composition. After discussions at the Bar and after some research, the learned counsel for the petitioner himself brings to my notice the decision in **Mathew** v. **State of Kerala** (1986 KLT 128), where Justice S. Padmanabhan, in paragraph 8, has observed thus in his clear and lucid style:

> " Where a particular offence is compoundable by a particular person it is not even necessary for the court to insist on a joint petition by that person and the accused. Even if the person who is entitled to compound the offence by himself files a petition before court stating that the matter has been compounded and the case may be closed the court will be bound to accept the same and close the case except in appropriate cases where it is felt that permission to compound the offence will have to be refused."

Those observations perfectly supports the conclusions that I have reached.

21. I shall now attempt to narrate my conclusions. They are:

(1) Composition under section 320 Cr.P.C. is a unilateral act.

(2) The victim (person shown in column 3 of S.320(1) and 320(2) can himself make an application for composition.

(3) It is not necessary for the court to insist on a joint application for composition. The victim can of course make a joint application.

(4) It is not necessary for the court to insist on the personal appearance of the accused before court to consider an application for composition under Section 320 Cr.P.C.

(5) The mere fact that the court has issued a non-bailable warrant against the accused and that is pending is no reason to the court not to proceed further with the case. All steps for which personal presence of the accused is not necessary can be continued even if the non-bailable warrant remains unexecuted and the accused has not personally appeared.

22. In the result:

(a) This Crl.M.C. is allowed.

(b) The learned Magistrate shall forthwith proceed to consider the application for composition filed by the victim and pass appropriate orders.

Personal presence of the petitioner shall not be insisted for consideration of such application for composition.

© Until a decision is taken on that application, execution of the non-bailable warrant issued against the petitioner shall stand suspended.

(R. BASANT)
Judge

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